Central Law Journal

St. Louis, January 5, 1923

CAN CONGRESS GRANT RIGHT TO JURY TRIAL FOR CONTEMPT OF COURT?

Judge R. M. Call, of the Federal District Court, Southern District of Florida, on November 24, 1922, holds that that portion of the Clayton Act providing for jury trial in matters of contempt—violation of an injunction issued by a Federal Court—is unconstitutional, as an encroachment by Congress upon the province of the Courts. The question came up in the cases of In re Atchison and Roberts and In re Shehee, not yet reported. A brief was filed in these cases by Mr. Robert H. Anderson, Jacksonville, Fla., as Amicus Curial, which very exhaustively covers the subject, and to which we are indebted for some valuable quotations made use of below.

We quote the following from Judge Call's opinion:

"The position of the government is that Congress transcended its powers in attempting to provide for a jury trial in cases of contempt, for the willful disobedience of a court order.

"The government contends that under our system of government established by the constitution, each department: the legislative, the executive and the judicial, are separate from and independent of each other, and their legitimate provinces may not be invaded by the others.

"That the power to punish for contempt is inherent in the courts, and being so inherent, it is essential to and inseparable and inalienable from them.

"That this power exists independent of legislation; cannot be taken away by legislation or abridged.

"That the Clayton Act, in-so-far as it undertakes to give one charged with contempt of court by a willful violation of an injunction duly issued by the court, a right of trial by a jury, so abridges the inherent power of the court to punish for such contempt, that it materially impairs it and in such respect is nugatory.

"The constitution of the United States divides the government into legislative, executive and judicial, and prescribes the powers and duties of each of these departments.

"Is the power of the courts to punish for the willful violation of an order duly and properly made inherent in the court, or is it dependent upon legislation?

"It can scarcely be questioned in this day that such power is inherent in the courts."

The following portion of the opinion is of interest on account of the fact that the court treats the defendants as not being employees of the railroad company in question:

"I am of opinion that that portion of the Clayton Act giving a jury trial to persons charged with contempt in violating the injunctional order of this court is of no force even in cases which fall strictly under said act.

"In the instant case it is extremely doubtful if these are cases falling under said act.

"These parties were not employees of the railroad at the time of the issuance of the injunction. The relation of employer and employee had been severed and no longer existed, by the withdrawal of such parties from the employment theretofore existing.

"There is a very full discussion of this question in the case of Canoe Creek Coal Company v. Christinsen et al., 281 Fed. 559, in which Judge Evans, District Judge, reached the conclusion that the parties were not entitled to a jury

trial for the reason that it was not a question arising between employer and employee, and his conclusions seem justified."

In Campbell's Lives of the Chief Justices, Wilmot is quoted as having said:

"The power which the Court in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for an act committed in the face of the Court; and the issuing of attachments by the Supreme Court of justice in Westminster Hall for contemps out of Court stands on the same immemorial usage which supports the whole fabric of the common law. It is as much the lex terrae and within the exception of Magna Charta as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges of its introduction, but can find none. It is as ancient as any other part of the common law. There is no priority or posteriority to be found about it. It cannot, therefore, be said to invade the common law. It acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. Truth compels me to say that the mode of proceeding by attachments stands upon the very same foundation as trial by jury. It is a constitutional remedy in particular cases and the Judges in these cases are as much bound to give an activity to this part of the law as to any other." Blackstone declares that:

"Laws without a competent authority to secure their administration for disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments and must be an inseparable attendant upon every superior tribunal. Accordingly, we find it actually exercised as early as the annals of our law exists." 4 Blackstone's Commentaries, 286.

Mr. Justice Brewer in In re Debs, 158 U. S. 594, says:

"But the powers of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been from time immemorial the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficience."

"The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and co-existing with them by the wise provisions of the common law. A court without power to effectually protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against recusant persons before it, would be a disgrace to the legislation, and a stigma upon the age that invented it." Watson v. Williams, 36 Miss., 341, 99 Am. State Reports, 640.

Judge Ray, of the Northern District of New York, in the case of United States v. Tom Wah, 160 Fed., 207, said:

"All courts of record have inherent power to enforce their orders and mandates by punishment as for contempt,

unless the law creating them expressly limits such power."

And added:

"It may be doubted whether Congress may create a court, and thereafter so limit its powers as to deprive it of the ordinary and necessary powers of a court. This would be to deprive it of one of its most essential attributes."

But Mr. Justice Story, in Martin v. Hunter's Lessee, 1 Wheat. 331, 4 L. Ed. 97, proceeding further, said:

"If then, it is the duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all; for the constitution has not singled out any class on which Congress are bound to act in preference to others."

And again:

"If Congress may lawfully omit to establish inferior courts, it might follow that in some of the enumerated cases the judicial power could nowhere exist."

And further:

"It would seem, therefore, to follow that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority."

NOTES OF IMPORTANT DECISIONS

ORDINANCE PROHIBITING MOVING PICTURE SHOWS ON SUNDAY UPHELD. An ordinance prohibiting the giving of moving picture shows on Sunday is upheld in City of Ames v. Gerbracht, 189 N. W. 729, decided by the Supreme Court of Iowa. The Court further holds that such ordinance is violated by giving such a show, although no admission fee is charged, and that the power to regulate "theatrical exhibitions" includes moving picture shows. On the question of the unreasonableness of the ordinance, raised by the defendant, the Court said:

"It is contended that in any event the ordinance is unreasonable, and should be held void because thereof. As we have indicated, the Legislature has conferred on municipal corporations the power to 'regulate' moving picture shows. This being true, is the particular ordinance in question an unreasonable regulation? The city council cannot act arbitrarily in the matter, even though the power to regulate is delegated, and even though the regulation pertains to the police power. But, under its power to regulate, there are undoubted numerous requirements that may be lawfully prescribed by the city council, pertaining to the manner in which the business is conducted. A few illustrative cases may be of assistance. In St. Louis v. Nash, 266 Mo. 523, 181 S. W. 1145, Ann. Cas. 1918B, 134, it was held that a moving picture building properly came within a regulation as to fire limits. In Jewel Theatre Co. v. State Fire Marshal, supra, the Court sustained a statute prohibiting moving picture exhibitions in any building not having its audience room at the street level. In Nahser v. Chicago, supra, an ordinance prohibiting the location of a moving picture show within 200 feet of any church was sustained as valid.

"Under the granted power, the Legislature could undoubtedly enact numerous provisions regarding the manner of conducting moving picture shows. The council could unquestionably pass an ordinance regarding the entrances and exits, fire escapes ventilation, and other similar matters pertaining to such places, and which come within reasonable police regulations. If the municipality has the power to enact ordinances of the character above indicated, no good reason can be given why it may not likewise pass an ordinance reasonably regulating the periods of time when a moving picture theater may be open.

"It must be remembered that the city council has a right to take into consideration the fact that large numbers of people attend such shows. Laying aside all consideration of any moral question involved in Sabbath observance, it is a fact that in every community in the land there is more or less of a cessation of labor on Sunday. The fact that people generally are at liberty from their usual occupations on that day easily makes possible the gathering of crowds at such places of amuse-

ment on Sunday. This of necessity may require additional police protection, which must be furnished by the city. This fact alone might be sufficient warrant for holding such a regulatory ordinance to be reasonable. Furthermore, the city council has a right to recognize the obvious fact that great numbers of our citizens devote this day to rest and worship, and to some degree of quietude. The city council also has a right, perhaps a duty, to reasonably protect such citizens against the disturbances incident to the gathering of crowds upon the streets in and about places of public amusement. Under the statute in question the city council has the same power to regulate circuses that it has to regulate moving picture shows. Would it be regarded as unreasonable for the city council of Ames, by regulatory ordinance, to provide that a circus should not exhibit in said city on Sunday? Such an ordinance would, we think, be regarded as reasonable, without regard to any moral question involved. The circus might be a 'moral show,' not only according to its flamboyant advertisements, but in fact as well. The same reasons, the gathering of crowds, the necessity of police protection, the disturbance of the quiet of other members of the community, that furnish a valid reason for the regulation of circuses, operate, in a lessened degree undoubtedly, but in the same general manner, to justify the regulation of moving picture shows on Sunday. It is a matter peculiarly within the discretion of the city council. We cannot, and we should not, hold the ordinance to be unreasonable, unless it is plainly and palpably so. We do not so regard it, and cannot hold it to be invalid as unreasonable."

SAILING CONVOY WITHOUT LIGHTS DURING WAR, NEITHER "WARLIKE OPERATION" NOR CONSEQUENCE OF ONE, WITHIN INSURANCE POLICY—Where vessels sailing in convoy collided, but were engaged in no warlike act, and those who issued orders to their navigators did not consider their orders to be warlike, even though performed in a war period, the fact that they were sailing at night without lights to avoid the submarine peril during a war period did not constitute a warlike operation, nor the consequence of one, under war risk clause of a marine insurance policy; nor was it a warlike operation because the vessels were sailing in convoy.—Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co. (C. C. A. Second Cir.), 282 Fed. 976.

"When one vessel of one of the convoys was attacked by a submarine, the course of the convoy was altered four points to the right; but before the convoys met, and this collision ensued, it was again altered four points to the left. This latter change must be deemed to have neutralized the former. The trial judge, who exhaustively examined the navigation of the vessels, concluded that the torpedoing of the vessel in the west-bound convoy was five hours before the meeting of the east-bound fleet, and did not affect the question of the collision or its cause. It did slow up the convoy making progress towards its point of destination. It was about 30 nautical miles from the scene of the torpedoing of the Merida to the point of collision, and about five hours were consumed in making that distance. It is explained that there was zigzagging of the vessels in making at least part of this distance. We conclude that this attack, occurring, as it did, some five hours previous to the time of the collision, has no bearing upon the cause of the collision.

"The appellant's contention is that this engagement was a warlike operation, because (first) the vessels were sailing without lights; (second) that they were proceeding in convoy; and (third) that the Napoli carried a cargo intended for warlike use. Where vessels proceeded at sea during this war period, it was the custom to sail without lights. These vessels were all operated without lights. The voyages upon which each of the vessels were engaged would, if in time of peace, be treated as an ordinary maritime adventure. It would not become a warlike operation, within the intention of the terms of the policy, because of the fact that, as a precaution against possible attack or capture, the masters of the vessels did not show lights during the night, and even though the consequences of such action meant the concealment of the vessels and their liability to collide. It may be imprudent navigation to take this risk, or it may be blameworthy from other points of view; but, if it is done in obedience to lawful commands, it cannot be considered a warlike operation. The object, of course, is to avoid an enemy's attack; but no enemy was present at the time of the collision. The purposes of the adventures of the ships were peaceable. Neither vessel was doing a warlike act, and those who issued the order to the navigators of the vessels did not consider their orders to be warlike, even though performed in a war period. In a word, nothing of actual hostilities was present at the time of the collision."

CONSTRUCTION OF ACTOR'S CONTRACT FOR SATISFACTORY PERFORMANCE.—In an action by the plaintiff to recover for wrongful discharge, it is held that a contract to render services as an actor to the satisfaction of an amusement company must be performed in accordance with its terms, and if the amusement company, acting in good faith, was not satisfied with plaintiff's services, he could not recover, although his work would be satisfactory to a reasonable man. Fried v. Singer, Mass., 136 N. E. 609.

"A contract like the one herein question where the employee is to render personal services and where consideration of the fancy, taste, sensibility and judgment of another are involved, must be performed in accordance with its terms; and if the amusement company or its representative, acting in good faith, was not satisfied with the services of the plaintiff, he cannot recover, and the judge so instructed the jury. McCarren v. McNulty, 7 Gray

(Mass.) 139; White v. Randall, 153 Mass, 394, 26 N. E. 1071; Whittemore v New York, New Haven & Hartford Railroad, 191 Mass. 392, 77 N. E. 717.

"Even if the work preformed would be satisfactory to a reasonable man, if the amusement company, acting in good faith, was dissatisfied with it, the plaintiff cannot recover. Williams Mfg. Co. v. Standard Brass Co., 173 Mass. 356, 53 N. E. 862; Farmer v Golde Clothes Shop, Inc., supra.

"It is the contention of the plaintiff that he was wrongfully discharged by the defendant, and the jury undoubtedly so found, having returned a verdict in his favor.

"The question is whether there was any evidence to warrant a finding that the plaintiff's services were satisfactory to the amusement company. In the absence of such evidence, he would be barred from recovery for a breach of the contract, assuming that the defendant acted in good faith and was not actuated by some ulterior motive, of which there is no evidence. Williams Mfg. Co. v. Standard Brass Co. supra; Farmer v. Golde Clothes Shop, Inc., supra."

A well-known case of this kind is that of Kendall v. West, 196 Ill. 221, where the rule is thus stated: A contract to render satisfactory services means satisfactory to the employer and that the employer, if dissatisfied, might discharge the employee for any reason which he might deem sufficient.

For a discussion of the law relating to the principle involved, see Wood Reaping & Mowing Mach. Co. v. Smith, 50 Mich 565; Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463; Walker v. Grout Bros. Auto. Co., 124 Mo. App. 628, 102 S. W. 25.

BOND INDEMNIFYING AGAINST "WRONGFUL ABSTRACTION" COVERS FORBIDDEN USE OF AUTOMOBILE DURING WHICH CAR WAS STOLEN.—It is held by the Appellate Court of Indiana, in Fidelity & Casualty Co. v. Blount Plow Works, 136 N. E. 559, that a fidelity bond, indemnifying an employer against loss through an employee's fraud, dishonesty, forgery, theft, embezzlement or wrongful abstraction, covered the employee's taking the employer's automobile for a personal mission, contrary to the employer's orders, during which use the car was stolen.

"Having determined the rule to be applied to contracts like the one in suit, under the circumstances stated, we will now direct our attention to the contract before us, and determine whether such rule must be applied in its construction, because the words 'wrongful abstraction' are used in naming the acts of said Sale for which appellant would be liable, in the event they resulted in loss to appellee Appellant contends that such words must be construed to mean an abstraction with intent to defraud or injure appellee, which the paragraph of complaint under consideration does not show We are unable to agree that such words must necessarily be given the meaning for which appellant contends. While a wide range of meaning is given to the words 'wrongful' and 'abstraction' in the various dictionaries and encyclopedias, we find that the former is said to imply the infringement of some right, and may result from disobedience to lawful authority, while the latter means to withdraw, remove or take away. In the instant case there is such a showing of a withdrawal or removal of appellee's automobile by said Sale, as to amount to an infringement of its rights. This being true, we are compelled to hold, under the rule stated above, that the act of said Sale, in taking and using the automobile in question under the circumstances alleged, was a wrongful abstraction of the same, within such meaning of said words. Our conclusion in this regard is in harmony with the rule, which recognizes that the general purpose of fidelity contracts, like the one in suit, is to secure full indemnity, and that such purpose should not be defeated, except by clear and unambiguous limitations, assented to by the parties. Dominion Trust Co. v. National Surety Co., 221 Fed. 618, 137 C. C. A. 342, Ann. Cas. 1917C, 447.

"Appellant, in an effort to lead the Court to a different conclusion, has cited the fact that certain dictionaries defined the word 'abstract', when used as a verb, as meaning: To remove secretly; hence to purloin. The act, operation, or process of drawing or dragging away, or otherwise withdrawing any material things, especially by surreptitious means, as, 'The abstraction of the purse by the pickpocket was cleverly managed.' But conceding that it may be used with such meaning, it may, nevertheless, be used with the meaning first above stated, so that the most that can be said is that 'wrongful abstraction' may be used with or without a dishonest or criminal signification. This being true, under the rule stated above, we must give such words the meaning most favorable to appellee, unless other portions of the bond disclose that they were used with a contrary meaning.

"It will be observed that the bond recites the acts of said Sale, for which appellant would be liable, in the event loss results therefrom, and after enumerating fraud, dishonesty, forgery, theft and embezzlement, adds the words 'wrongful abstraction'. From this fact we may assume that the parties, after using the words 'fraud' and 'dishonesty', which imply an evil purpose, and the words 'forgery', 'theft' and 'embezzlement', which imply a criminal intent, desired to use an expression which implied neither, and hence chose the words 'wrongful abstraction' to cover the acts of said Sale, resulting in loss to appellee, which were merely done without right. We may assume that appellant prepared the bond in suit, and that it knew the various meanings, and shades of meaning, in which the words in question are defined and used, and with such knowledge used the same, without the qualifying clause, 'amounting to larceny or embezzlement'. Had such a qualifying clause been used, the question we are now considering would be an easy one. The contract, however, is not so written. So to limit it by construction would be to write something into it which was omitted when the same was prepared, a thing we are not permitted to do."

CONSTITUTIONAL MISCONCEPTIONS.

By Wayne B. Wheeler, LL.D.,
Washington, D. C.

Much agitation and discussion is being heard at the present time over the Constitution of the United States. There is, on the one hand, the clamor of those who seek a centralization of power in the Federal government, and on the other, the warnings of those who fear the utter destruction of the rights of the States. The existence of such a discussion is the surest sign of a wholesome interest upon the part of the people in a civil State.

In some of the discussions which are heard many constitutional misconceptions are evident. Those who fear the gradual encroachment of the Federal government upon the rights of the States frequently point to legislation by Congress making appropriations for maternity purposes, proposed Federal legislation to suppress lynching and Federal measures to control education, as well as the Eighteenth Amendment and Volstead Act. It is not the purpose of this article to discuss the merits of any of these measures, it is merely proposed to show the striking and fundamental difference, from the constitutional standpoint, between the Eighteenth Amendment and National Prohibition Act and legislation of the character referred to above, since they are too frequently confused by being placed in the same category in such discussions, also to point out the construction which has been given by the courts to the words "concurrent power" used in the Amendment, concerning which there appears to be much misapprehension.

The Eighteenth Amendment is an amendment to the Constitution itself, enacted by the people in accordance with the provision made by Article V of the original Constitution for such changes in the fundamental law as experience showed to be necessary for the better execution of the popular will. In the case of Rhode Island v. Palmer, 253 U. S. 350, the Supreme Court of the United States held:

> "The prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment to the Federal Constitution, is within the power to amend reserved by the 5th article of such Constitution."

This Amendment is therefore as much a part of the Constitution as any of the original articles and through it the prohibition of beverage intoxicants has become a constitutional principle.

In the case of the other legislation referred to, it is an attempt to secure what are considered by many to be necessary reforms through Federal legislative action attempted under the guise of some of the constitutional powers conferred upon Congress. It is at this point that the constitutional objections arise, but the dangers from this source of the destruction of the line of demarkation between the powers of State and Federal government are greatly magnified. The Supreme Court of the United States was created for the specific purpose of construing the Constitution and preserving these constitutional distinctions. It has recently evidenced that it is not unmindful of its function by its decision in the child labor case wherein it declared the Child Labor Act unconstitutional because of its attempted invasion of the rights of the States in the guise of the taxing power. History shows that the Supreme Court can be depended upon to preserve the delineation between the power of the State and Federal governments. That court said in the child labor case:

> "Out of a proper respect for the acts of a co-ordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended

to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departure from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states. * * *"

The status of prohibition legislation, flowing as it does directly from an amendment to the Constitution itself, is therefore, essentially different from that of other legislation for which there is no express constitutional sanction, and whose validity must depend upon whether the subject-matter may be controlled as an incident to the exercise of a power expressly conferred. Measures of this character are usually attempted to be sustained as the exercise of the power conferred upon Congress to levy taxes, or in the exercise of authority to regulate interstate commerce. In each of such cases the question arises whether the legislation in question is within the scope of the constitutional power sought to be exercised. The ultimate determination of this question rests with the Supreme Court.

CONCURRENT POWER UNDER THE EIGHTEENTH AMENDMENT

Another point involving the Eighteenth Amendment upon which there is apparently some misapprehension is the meaning of the concurrent power which is reserved to the States. These misconceptions, generally speaking, may be divided into two classes, first, the view which apparently prevails in some quarters that a State may legislate under the Eighteenth Amendment so as to legalize what the Federal statute prohibits; and second, the supposition that the States may not legislate more rigorously than the Federal law. Both of these questions have been passed upon by the courts.

One of the efforts now being made in several of the States by the opponents of prohibition is to secure the enactment of a State law which will declare lawful the sale of beverages containing a higher alcoholic content than that permitted by the Federal statute. This is designed to permit the sale of so-called light wine and beer. The illegality of such a proposal as well as its impracticability becomes manifest when the decisions of the courts are considered.

This was one of the questions presented to the Supreme Court of the United States in the case of Rhode Island v. Palmer, 253 U. S. 350, 64 L. Ed. 947. The State of Rhode Island had enacted a law defining non-intoxicating liquors to include liquors which contained one per cent and not more than four per cent of alcohol by weight. In the Volstead Act intoxicating liquors were defined to include those containing as much as one-half of one per cent of alcohol by volume. An injunction was sought against the officers of the United States to restrain them from the enforcement of the Volstead Act on the grounds that the definition fixed in the State statute protected its citizens against prosecution for traffic in liquors which did not fall within the State definition. This construction was not sanctioned by the United States Supreme Court. That court said:

> "The declaration in the Prohibition Amendment to the Federal Constitution that 'the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation' does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means."

The Supreme Court of Massachusetts in the case of Jones v. Cutting, 130 N. E. 271, held:

"No law of the Commonwealth of Massachusetts can authorize sales of so-called nonintoxicating beverages prohibited by the laws of the United States enacted pursuant to Const. U. S. Amend. 18, the Prohibition Amendment."

The second question, namely, whether the states may enact legislation more drastic than the Federal statute is one which has also given rise to some popular misunderstanding. This is due, perhaps, to the fact that under some of the powers conferred upon Congress by the Constitution when Congress has acted such action has been held to exclude legislation by the States. In still other instances of the exercise of constitutional power it has been held that both Congress and the States may legislate, but that when Congress has acted its authority is paramount. These differences arise both from the language of the constitutional provision and the nature of the power conferred in the particular constitutional provision.

It is not within the purview of this article to trace the various distinctions made with reference to the several powers conferred upon Congress by the Constitution during the hundred and thirty-three years of interpretation by the Supreme Court, but simply to point out the construction which is placed upon the power of the State to suppress the traffic in beverage intoxicants since the adoption of the Eighteenth Amendment to the Constitution.

This requires a consideration of the nature of the Eighteenth Amendment. Prior to its adoption the police power over the subject of intoxicating liquors resided in the States. Congress had no power over the subject-matter except such incidental regulations as were enacted under the commerce clause or by virtue of its authority over the territories or other places exclusively subject to the jurisdiction of the United States. The police power of the states over the traffic in intoxicating liquor was plenary. When the people, by the adoption of the Eighteenth Amendment, conferred upon Congress authority to legislate upon the subject, they expressly provided for the retention of State control over the subject-matter through the language of the amendment which provided that "Congress and the several states shall have concurrent power to enforce this article by appropriate legislation". This section reserved to the states the right to exercise their police power for giving effect to the prohibitions contained in the amendment. There is in this legislation no question of irreconcilable conflict between sovereigns since the power resides in the people and they have determined that the machinery of both the State and Federal government shall be available for giving effect to the principle incorporated in the amendment. The states never having parted with their police power which was plenary, and since by the Ninth Amendment the power not delegated to the United States by the Constitution is expressly reserved to the States, or to the people, the States are within the sphere of their jurisdiction, possessed of authority to legislate more rigorously than the Federal government may have done. The sole limitation upon the power of the States under the amendment is that they may not legalize what the Federal law prohibits. This has been the construction placed upon the word "concurrent" in the Eighteenth Amendment.

Former Chief Justice White in his opinion in the National Prohibition Cases, clearly expressed the purpose of the Eighteenth Amendment when he said:

"* * * In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state lines or the distinctions between state and Federal power, and contemplating the exercise by Congress of the duty cast upon it

to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the Amendment and the legislation of Congress enacted to make it completely operative. * * *"

That the State may legislate more rigorously than the Federal government in the exercise of its police power is shown by the decision of the United States Supreme Court in the case of Vigliotti v. Pennsylvania, wherein the Supreme Court of the United States affirmed the decision of the Supreme Court of Pennsylvania which had held the Brooks License Law of Pennsylvania to be appropriate legislation for the enforcement of the Eighteenth Amendment although enacted before the Amendment was adopted and notwithstanding that the definition of intoxicating liquors contained in the Brooks Law was more comprehensive than that in the Volstead Act. Many other cases decided by the courts of last resort in the various states adhere to this view.

Chief Justice Clark, of the Supreme Court of North Carolina, in speaking of the concurrent power of the States under the Eighteenth Amendement said:

"But it does not restrict the power of the States to make their own police regulations against intoxicating liquors more extensive and of broader scope than the Eighteenth Amendment."

The Supreme Court of Indiana said:

"The police power reserved * * * is neither abridged nor abrogated by Amendment 18 of the United States Constitution. * * *"

The Supreme Court of Appeals of West Virginia said:

"This plainly gives to the several states power to adopt such means by way of legislation as will best meet the obstacles existing in each locality to the enforcement of the law. The fact that some States may make an offense not included within the general prohibition law enacted by Congress can make no difference so long as the general purpose is kept in view."

The Supreme Court of Appeals of Virginia said:

"This does not present a situation of divided sovereignty with respect to the punishment of such offenses. * * * The Congress is not given power to legislate on the subject of offenses against the state. That is a police power of the state. None of this is either expressly or impliedly delegated to the Federal government or prohibited to the states by the Eighteenth Amendment."

The question has arisen in many ways, such for example as in the States in which the state law provided a more severe penalty for the violation of the law than did the Federal statute. In such cases it has been uniformly held that the State penalty might be imposed notwithstanding that the Federal statute was less drastic. Other State statutes have been sustained which prohibited possession of all intoxicating liquors for beverage purposes notwithstanding the fact that the Volstead Act exempts from its prohibitions the possession of liquor stored in bona fide homes acquired prior to the date upon which the Act became effective. In only one state has a decision been otherwise. This opinion, though referred to, has not been followed by the courts in other states.

The Eighteenth Amendment while sometimes referred to as creating a new relationship between the state and national government, unlike that conferred by any other provision of the Constitution, does not in fact establish a new precedent. There are many instances in which Congress and the States may act over the same subject-matter and it is not unusual for the same act to constitute an offense against the law of the State as well as against the Federal statute. The Supreme Court of the United States succinctly pointed out the relationship of the citizen to the State and Federal government in

the case of Moore v. Illinois, 14 Howard 20, 14 L. Ed. 306, wherein it was said:

"Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state, a riot, an assault, or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses; for each of which he is justly punishable."

CONCURRENT POWER MEANS

Equal power by state and nation to carry out the purpose of the Eighteenth Amendment.

It means co-operating, not conflicting or contracurrent power. There can be no conflict when both powers are used as intended. The Supreme Court well said: "It cannot possibly be that Congress and the states entered into the great and important business of amending the Constitution in a matter so vitally concerning all the people solely in order to render governmental action impossible, or if possible, to so define and limit it as to cause it to be productive of no results and to frustrate the obvious intent and general purpose contemplated."

It means equal co-operating power to enforce National Prohibition by appropriate means. The court said: "The second section of the amendment does not enable Congress or the several states to defeat or thwart the Prohibition, but only to enforce it by appropriate means." * * * "Observe also the words of the grant which confines the concurrent power given to legislation appropriate to the purpose of enforcement."

Appropriate legislation to effect the purpose of Prohibition has a well defined meaning. It includes the prevention of the use of intoxicating liquor. Legislative bodies may exercise this power when it is necessary to provide against the evils arising from the traffic. The courts have said repeatedly, "The purpose of legislation to prohibit the manufacture and sale of intoxicating liquors, is to prevent their use." It is clear, therefore, that under concurrent power either the state or the Federal government may go as far as it desires in enacting appropriate Prohibition laws and enforcement legislation, that has a reasonable relation to the purpose of the Eighteenth Amendment. Each may exercise its full power to prohibit, but neither can prevent the other from enforcing its legal Prohibition acts or permit what the other unit of government prohibits.

MUNICIPAL CORPORATIONS—PARKING ORDINANCE VALID

McGUIRE v. WILKERSON

209 Pac. 445

Criminal Court of Appeals of Oklahoma, Oct. 2, 1922

For provisions of a city ordinance regulating the parking of automobiles and other vehicles, and limiting and providing a zone wherein automobiles, jitneys and other vehicles conveying or transporting passengers for hire, and trucks and drays engaged in the business of hauling freight or merchandise for hire, shall not park, held not to deprive owners and operators of such vehicles of their liberty or property without due process of law, and not to be unreasonable and discriminatory, see body of opinion.

Application for habeas corpus of A. McGuire against W. R. Wilkerson, Chief of Police of the City of Pawhuska, Okla. Writ denied.

Petitioner, A. McGuire, applies for a writ of

habeas corpus, alleging that he is unlawfully restrained by the above-named respondent, Chief of Police of the City of Pawhuska, Okla.; that the cause of said restraint is as follows: That petitioner was, on the 19th day of June, 1922, convicted in the police court of said city of a violation of Sections 1 and 3 of Ordinance No. 36-M of the city of Pawhuska, and sentenced to pay a fine of $16 and $4 costs, and remanded to the custody of said respondent chief of police until said fine and costs were paid.

Petitioner alleges that said ordinance is void and without effect, in that it deprives him of liberty and of the use of his property without due process of law; that said petitioner was engaged in the business of transporting passengers by automobile for hire within and without the city of Pawhuska, Okla., and that said ordinance permits all persons owning and using automobiles, jitneys, trucks and drays to park the same and carry on their business and occupation in the district prohibited to those using such vehicles for hire; that said prohibited district, as defined by the ordinance, includes the entire business district of the city of Pawhuska, except two or three minor businesses carried on away from the business district on side streets; that if said ordinance is enforced against petitioner it will drive him from the business district of Pawhuska and compel him to park his cars and carry on his business in the residence district; that affiant carries on his business in an orderly, quiet, and peaceable manner, commits no nuisance, and molests no one by reason of his business; that the attempt to enforce Ordinance No. 36-M is for the sole purpose of depriving petitioner of his business and destroying the only means of transportation open to the public in the city of Pawhuska; that petitioner is one of several engaged in that line of business, and against whom the city is now attempting to enforce the ordinance; that on the 19th day of June, 1922, petitioner applied to the district judge of the Twenty-fourth Judicial District for a writ of habeas corpus, praying for his release from said restraint, but that upon a hearing said district judge discharged the writ and remanded petitioner to the custody of this respondent. Petitioner attaches to his petition a copy of the order of the district judge in said proceeding, also a copy of Ordinance 36-M.

As a return and answer to the writ, the respondent admits that he is chief of police of the city of Pawhuska, and that he has custody of the person of petitioner, and holds such custody by virtue of the authority of a commitment issued by the judge of the police court of said city on a conviction for a violation of Ordinance 36-M, and that the copy of the ordinance attached to the petition as an exhibit is a true and correct copy thereof; that said ordinance has been in full force and effect in said city since the 9th day of June, 1922; that on the 17th day of June, 1922, petitioner herein was duly and regularly informed against for a violation of the terms and provisions of said ordinance, as evidenced by a copy of complaint attached to answer; that on the 19th day of June, 1922, petitioner was duly and regularly adjudged guilty of violating Sections 1 and 3 of said ordinance, and fined $16 and costs, taxed at $4, and committed to jail until said fine and costs were paid, as appears by a transcript of the docket of the police court of said city, copy of which is attached to respondent's answer.

Further answering, respondent states that the area in said city in which automobiles and other motor vehicles engaged in the occupation of conveying passengers for hire is prohibited is limited to the congested district of said city, the location of said restricted area being shown upon a map or plat of said city, which is attached to the answer; that as shown on said plat, Main street is 80 feet in width from property line to property line, Osage avenue is 70 feet in width from said lines, Ki-he-kah avenue is 70 feet in width from said lines, Sixth street is 80 feet in width from said lines; that upon each of said streets and avenues sidewalks on each side thereof extend 12 feet from the property line, leaving traffic ways on 80-foot streets 56 feet wide, and on 70-foot streets 46 feet wide, and at places such traffic ways are less than that; that the means of transportation in said city is almost exclusively by automobile or other motor vehicles, and that by reason thereof that the traffic on such streets and avenues, and the parking of such vehicles at the curb, results in practically a congestion of traffic on said streets and avenues, to the extent that the peace, comfort, health and safety of the inhabitants of said city and those lawfully using its streets and avenues and traffic ways is endangered; that as a part of the plan to relieve such congestion, and to otherwise facilitate traffic on such streets and avenues, the board of city commissioners enacted Ordinance No. 36-M, and the enactment of said ordinance was solely for the purpose of relieving traffic congestion in said restricted area, and not otherwise, and this, respondent is informed and believes, was without prejudice to petitioner or others engaged in operating automobiles, trucks, or other conveyances engaged in the business or occupation of conveying passengers for hire; that there are approximately 50 automobiles and other conveyances subject to the provisions of said ordinance, and

that permanent parking and the operating of places of business within the congested district, being the restricted area as set out in the ordinance, has tended seriously to interfere with traffic on said streets and avenues, and is against the peace, health, comfort and safety of the inhabitants of said city and others rightfully entitled to use the traffic ways of said streets and avenues; that the population of said city is approximately 9,000 inhabitants, and is steadily increasing; that it covers an area of approximately two square miles; that, as shown on the map or plat, the area restricted by the ordinance extends to a very small portion of the business section of said city; that a large number of desirable stands for those engaged in operating automobiles for hire, and being in the business district of said city, are not within the restricted area, for which reasons respondent is informed and believes that the provisions of Ordinance 36-M are reasonable, and not intended to, and do not, discriminate against petitioner or those engaged in a similar business, but said ordinance was enacted in good faith, for the sole purpose of promoting the peace, health, comfort, safety and general welfare of the inhabitants of said city, and not otherwise.

The cause was submitted on the 23d day of June, 1922, at which time petitioner was enlarged on his own recognizance, pending final determination of the application.

L. P. Mosier, of Pawhuska, for petitioner.

E. E. Grinstead, City Atty., of Pawhuska, for respondent.

MATSON, J. (after stating the facts as above). This proceeding presents the question of the validity of Ordinance No. 36-M of the city of Pawhuska, Okla., effective June 9, 1922, especially Sections 1 and 3 of said ordinance.

Said ordinance is entitled as follows:

"An ordinance regulating the parking of automobiles and other vehicles within the city of Pawhuska, Okla.; regulating, limiting and providing a zone therein in which automobiles, jitneys and other vehicles conveying or transporting passengers for hire within said city, or trucks or drays engaged in the business of hauling freight or merchandise for hire therein, shall not be permitted to park; and providing a district therein in which the owner or driver of such automobile, truck, jitney or other vehicle engaged in the business or occupation of transporting or conveying or hauling passengers, freight or merchandise for hire, shall not park, solicit business or maintain a stand therein, and providing for necessary signs, markings, traffic regulations and prescribing a penalty for a violation thereof," etc.

Sections 1, 2 and 3 of aid ordinance read as follows:

"Section 1. That all automobiles, trucks and other vehicles, except as hereinafter provided, shall be parked at an angle of forty-five degrees, with the right front wheel touching the curb, on the following designated streets and avenues, and within the following described limits, in the city of Pawhuska, Oklahoma, to-wit: Main street, between its intersection with the east line of Matthews avenue and its intersection with the west line of Leahy avenue; Osage avenue, north of its intersection with the north line of Fifth street; Ki-he-kah avenue, south of its intersection with the south line of Seventh street; and Sixth street, between its intersection with the west line of Leahy avenue and its intersection with the east line of Ki-he-kah avenue.

"Sec. 2. On all other streets and avenues not mentioned in Section 1 of this ordinance, said automobiles, trucks and other vehicles shall park parallel with the curb.

"Sec. 3. No owner or driver of an automobile, truck or dray, jitney or other conveyance engaged in the business or occupation of conveying pasengers or merchandise for hire to or from any place within or without the city of Pawhuska, Oklahoma, shall park, solicit business or maintain a stand either on the streets or avenues or on the sidewalks contiguous thereto within the limits prescribed in Section 1 of this ordinance."

Then follow ten other sections prescribing methods of parking automobiles on various streets, prohibiting parking on certain sides of certain streets, providing for the direction traffic shall take on certain streets, repealing a certain other ordinance of said city, declaring an emergency, all of which provisions are not pertinent to the isues here presented.

No question is raised as to the power of the board of city commissioners of the city of Pawhuska to pass local legislation on the general subject embraced within the ordinance. On the presentation of the application for the writ, counsel for petitioner contended that the ordinance was void on two grounds: (1) That it deprived petitioner of his property without due process of law; and (2) that it was an unreasonable discrimination against the petitioner and those engaged in a similar occupation, and that therefore it is void as an unreasonable exercise of the police power.

[1] Habeas corpus will lie to discharge a prisoner restrained of his liberty by virtue of a conviction based upon a void ordinance.

In re Unger, 1 Okla. Cr. 222, 98 Pac. 999.

"The streets and highways of the State belong to the public. They are built and maintained at public expense for the use of the general public in the ordinary and customary manner. The State, and the city as an arm of the State, has absolute control of the streets in the interests of the public. * * * The use of the streets as a place of business or as a main instrumentality of business is accorded as a mere privilege and not as a matter of natural right." Hadfield v. Lundin, 98 Wash. 657, 168 Pac. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942.

[2] The petitioner would have no vested right to use the streets for carrying on a private business as a common carrier, and the city has power to regulate the operation of jitney busses over the streets. State v. Pitney, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209; Nolen v. Riechman (D. C.), 225 Fed. 812; Ex parte Sullivan, 77 Tex. Cr. R. 72, 178 S. W. 537; Rast v. Van Deman & Lewis Co., 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Desser v. Wichita, 96 Kan. 820, 153 Pac. 1194, L. R. A. 1916D, 246.

[3] A valid ordinance stands on the same footing as a statute, and its construction is for the court Berry on Automobiles (2d Ed.) Sec. 68, p. 80.

[4, 5] Whether or not an ordinance is reasonably necessary is committed in the first instance to the municipal legislative body, and the ordinance when passed is presumptively valid. Berry on Automobiles (2d Ed.), Sec. 69, p. 82.

In Swann et al. v. Baltimore City, 132 Md. 256, 103 Atl. 441, the Court of Appeals of the State of Maryland held a statute of that State "authorizing the board of police commissioners in the city of Baltimore to set aside and designate certain places therein to be occupied and used as public or private stands for hackney carriages, to stipulate the number which may occupy and use such stands, and make regulations for their occupation and use, and also providing a fine for violating its provisions and regulations made by the board", to not deprive the owners and operators of such vehicles of their business or property without due process of law.

In Yellow Taxicab Co. v. Gaynor, 143 N. Y. Supp. 279 (82 Misc. Rep. 94), it is held:

"Parties maintaining hack stands in the streets under contracts with the owners or licensees of abutting property had no property rights in the streets within Const. N. Y., Art. 1, Sec. 6, and Const. U. S. Amends. 5 and 14, providing that no person shall be deprived of his property without due process of law, and hence an ordinance abolishing such hack stands was not invalid, since abutting owners could not, by their private contracts, confer any right upon the hackmen inconsistent with the right of the local authorities to regulate the business of hackmen and prescribe reasonable regulations as to the use of the streets."

In Sanders et al. v. City of Atlanta et al., 147 Ga. 819, 95 S. E. 695, it is held:

"A city ordinance, providing that 'no taxicab, motor bus, hack, or other vehicle for hire shall park on any street within the fire limits of the city of Atlanta longer than to discharge or take on passengers, unless in actual service, except in front of railroad stations, and except that three taxicabs or hacks, for the exclusive use of the patrons of hotels, shall be allowed to park either in front or on the side of hotels where permission is obtained in writing from the proprietor of such hotel', and that 'no hotel proprietor can give permission to park in front of any place of business occupying the store on the ground floor facing the street,' etc., and providing a fine not exceeding $50, or imprisonment on the public works not exceeding 30 days, either or both penalties to be inflicted at the discretion of the recorder for a violation of the ordinance, is valid as against the objection that it is unreasonable and confiscatory. See Berry on Law of Automobiles, Sec. 64; Pugh v. Des Moines, 176 Iowa, 593, 156 N. W. 892, L. R. A. 1917F, 345; Com. v. Fenton, 139 Mass. 195, 29 N. E. 653; Cohen v. New York, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506."

In the case of Pugh v. City of Des Moines et al., 176 Iowa, 593, 156 N. W. 892, L. R. A. 1917F, 345, the Supreme Court of Iowa held an ordinance prohibiting the parking of automobiles between fixed times in the streets of a restricted area, but allowing them to stand not over 20 minutes while such vehicle is being loaded or unloaded, to be not invalid.

In City Cab Co. v. Hayden, 73 Wash. 24, 131 Pac. 472, L. R. A. 1915F, 726, Ann. Cas. 1914D, 731, it is said:

"The general power of municipalities to regulate and control the conduct of hackmen and others soliciting the privilege of carrying travelers from railroad depots to their place of destination cannot, we think, be sucessfully questioned. This the city must do in the interest of good order, public peace and safety."

In the case at bar, the petition discloses no property rights which the petitioner would be unlawfully deprived of by the continued enforcement of the ordinance. Petitioner and others operating automobiles for hire in the city of Pawhuska have no property rights in the streets of that city that would be superior to the regulation adopted by the board of commisisoners under its police power as delegated by the laws of this State. The city of Pawhuska, having the authority to pass reasonable regulations governing automobiles operated on its streets for hire, this Court would not be authorized to declare the provisions of the ordinance here attacked unreasonable, unless it clearly appeared that they were so.

Numerous other cases from various States, construing ordinances and statutes regulating the operation of jitney busses and other automobiles used for hire over the public highways and streets, might be cited. But from what has heretofore been stated, and from the authorities above cited, we think it sufficiently appears that the ordinance in question is not unreasonable, discriminatory, nor arbitrary,

nor does it deprive petitioner of his liberty or property without due process of law.

The writ is denied, and petitioner remanded to the custody of respondent, chief of police of the city of Pawhuska.

DOYLE, P. J., and BESSEY, J., concur.

NOTE—*Validity of Parking Ordinances.*—An ordinance prohibiting between certain hours, the standing of vehicles on certain designated streets for a longer period than one hour, and prohibiting vehicles from being left standing in certain other streets at all between certain hours, except that vehicles in charge of some person might stand in said streets not longer than 20 minutes while being loaded or unloaded, was upheld as a valid regulation. Pugh v. Des Moines, 176 Ia. 593, 156 N. W. 892; People v. Harden, 110 Misc. 72, 179 N. Y. Supp. 732.

An ordinance which prohibits any person from allowing his vehicle to stop in a street for a longer time than 20 minutes is valid, and the fact that one has a license as a hawker and peddler does not exempt him from the ordinance. Com. v. Fenton, 139 Mass. 195, 29 N. E. 653.

An ordinance of Atlanta, Ga., providing that no taxicab, motor bus, hack or other vehicle for hire shall park on any street within the fire limits longer than to discharge or take on passengers, with certain exceptions, was upheld. Sanders v. Atlanta, 147 Ga. 819, 95 S. E. 695.

ITEMS OF PROFESSIONAL INTEREST

IDENTIFICATION BY HANDWRITING

The danger of convictions which rest chiefly on the evidence of handwriting experts was strikingly shown in the Lewes postcard case last year, when the Home Office released a convicted schoolmistress on finding that the libels, alleged to be in her handwriting, continued after she was in gaol. The same danger has been illustrated recently by a case before the Highgate Bench, noted in the daily press, in which a postman was accused of stealing a registered letter, and was proved to be innocent by a most fortunate chapter of accidents. Here complaint was made to the postal authorities that a registered letter had not been received by the addressee; but inquiry showed that the postman had received the letter for delivery and had brought back the official receipt signed 'Dorothy Smith'. Now Dorothy Smith was not the addressee, nor was there any person of that name on the premises; and, on investigation, similarities between the postman's own handwriting and that of 'Dorothy Smith' were discovered. On being asked for an explanation he recollected that he could get no answer when he knocked, but that a woman, who appeared to be a neighbor, had taken the packet for the addressee, and had signed for it. Unfortunately, no neighbor named 'Dorothy Smith' could be traced. Naturally the case looked conclusive against the accused.

During the remand, however, the real 'Dorothy Smith' saw the case in the newspaper, and at once identified the incident. She had been calling at neighboring premises and had taken the letter for the purpose of handing it over to the occupier of the house to which it was addressed when the latter returned; some delay had occurred in doing so. Her evidence, of course, exonerated the postman entirely. But the moral of all such cases is clear: it is exceedingly dangerous to rely on apparent similarities of handwriting. Handwriting is largely a matter of (1) age, (2) occupation, and (3) the frequency with which a person writes; and where all three conditions happen to be of much the same character in the case of two persons, their handwriting will often appear to have a certain superficial resemblance.—Solicitors' Journal, Nov. 4, '22.

BREAD AND WATER DIET FOR JURORS

After the jury, which convicted accused of selling intoxicating liquors, had deliberated several hours, they returned into open court and stated that they were hopelessly hung and stood 10 to 2, whereupon the Court told them that they had not considered their verdict long enough; that it was early in the week, and that he would keep them together for the balance of the week, and along toward the end of the week he would put them on bread and water. While these remarks were held to have been improper, the judgment of conviction was affirmed by the Supreme Court of Arkansas in Holmes v. State, 240 Southwestern Reporter, 425, for the reason that no objection was interposed when the remarks were made.

In the opinion, which was written by Judge Smith, it was said, in discussing the statement "We are all of the opinion that the remark was highly improper and should not have been made; but the majority are of the opinion that the error was waived when appellant failed to object. In their opinion, the attention of the Court should have been called to the possible effect of the remark on the jury, thereby giving the judge an opportunity to withdraw it or to explain that it was not to be taken literally. It is the practice of this court to require an objection to be made in the trial below, and, unless made there, the error will be treated as waived; and this rule has been applied to remarks of the Court as well as to other proceedings at the trial."—Chicago Legal News.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Action**—Statute.—Under the Crimes Act, § 24, a person whose goods have been stolen may sue the thief for the value thereof, and this right is not dependent upon the pendency of a criminal prosecution for the theft of the goods.—State v. Mail, Kan., 209 Pac., 820.

2. **Attorney and Client**—Fee.—There is no provision in equity permitting a court, in the exercise of equitable powers, to declare an allowance of attorney's fees and payment of them out of a fund resulting from a taxpayer's suit against a county treasurer, for failure to turn over taxes, before the fund comes under the control of the court.—People v. Holten, Ill., 136 N. E. 738.

3 **Automobiles**—Cause of Accident.—Where automobile driver, turning corner where view was obstructed by concrete mixer resting on the crosswalk, collided with a child on the crosswalk, the jury could have found that the failure to give signal by blowing horn or otherwise contributed to the accident.—Bengle v. Cooney, Mass., 136, N. E., 812.

4.——Contributory Negligence.—If the car in which a person was injured, under such circumstances and in such manner, was driven along the right-hand side of the road, at such rate of speed that it could not be stopped within the distance at which an approaching or standing car on the same side of the road could be seen, upon the assumption that no approaching vehicle would occupy that side of the road, and the density of the fog was such as to render it doubtful whether persons using the road could determine its exact character or their exact position upon it, he is precluded from right of recovery of damages for his injuries, by his contributory negligence—Ewing v. Chapman, W. Va., 114 S. E., 158.

5.——Signals.—In action for injuries to boy struck by automobile while standing with other boys in road, on or near edge of pavement, in which there was evidence tending to show that the boy at the time he was struck by defendant's automobile was in a position of imminent danger of being struck by oncoming automobiles, instruction that automobile driver is required to sound a signal at scene of imminent danger held proper.—Edwards v. Lambert, Wash., 209 Pac. 694.

6. **Bankruptcy**—Homestead.—Where a bankrupt was the head of a family, his place of business was in one city, his residence was in another city, and the value of both did not exceed $5,000, both were exempt under Const. Tex. art. 16, § 51, exempting a homestead in a city, town, or village not exceeding the value of $5,000, provided it is used as a home or place of business of fthe head of the family, in view of the purpose of the homestead provisions as shown by Acts Tex. 1860, c. 38, and Constitutions of 1845, 1861, 1866, 1869 and 1876. —In re Elkel, U. S. D. C., 283 Fed. 285.

7.——Preference.—The deposit of money in a bank to his own credit subject to check by an insolvent within four months of bankruptcy was not a preference, within Bankruptcy Act, § 60a.—Lowell v. Merchants' Nat. Bank, U. S. D. C., 283 Fed. 124.

8.——Preference.—Under Bankruptcy Act, § 67 (Comp. St. § 9651), relative to the dissolution of liens obtained through judicial proceedings, where a garnishment was filed only a few days before the petition in bankruptcy and would work a preference, payment by the garnishee to the creditor after the adjudication was wrongful, and the creditor's possession, so procured, would not support an adverse claim by him.—Schrepel v. Davis, U. S. C. C. A., 283 Fed. 29.

9.——Qualified Creditors.—Where an involuntary petition in bankruptcy as to the allegation of indebtedness is in point of form perfect, the defect appearing only through failure of proof in respect to evidence of indebtedness, any qualified creditor or creditors may after the four-month period come in, pick up, and carry forward the petition, which its original proponents are not able or willing to do. —In re Diamond Fuel Co., U. S. C. C. A, 283 Fed. 108.

10.——Taxes.—The word "dividends," as used throughout the Bankruptcy Act, means partial payments to general creditors, and the provision of section 64a (Comp. St. § 9648), requiring payment of taxes "in advance of the payment of dividends to creditors," does not prevent the payment of debts given priority by section 64b, before payment of taxes.—In re West Coast Rubber Corporation, U. S. D. C., 283 Fed. 351.

11. **Banks and Banking**—Agency.—The president of a trust company to which land was entrusted to sell, not being so authorized by it, had no power to plat it and record the plat.—Weber v. Aluminum Ore Co., Ill., 136 N. E. 685.

12.——Agency.—Where a bank takes a draft for value and without notice, it becomes, prima facie, the owner; but where there is an agreement between the bank and the person from whom the draft is acquired that the bank shall have the right to charge back the amount, if the draft is not paid, by express agreement, or one implied from the course of dealing, and not by reason of liability as drawer, the bank is an agent for collection and not a purchaser—Mangum v. Mutual Grain Co., N. C., 114 S. E. 2.

13.——Deposits.—A depositor has the right to tender a deposit for a special purpose, and, if a bank receives such a deposit, the officers of the bank have no right to divert the deposit to other purposes.—Union Trust & Savings Bank v. Southern Traction Co., U. S. C. C. A. 283 Fed. 50.

14.——Drafts.—Where a bank acknowledged a letter of credit and agreed to negotiate drafts drawn thereunder against documents for "standard white granulated sugar," on presentation of documents describing the sugar as "granulated white sugar (Java No. 24) (direct polarization) 98.5%" the bank was not obligated to honor the drafts.—National City Bank v. Seattle Nat. Bank, Wash., 209 Pac. 705.

15——Injunction.—Conceding that the conduct of such business was ultra vires the bank such fact is not a defense open to the defendant when an injunction is sought against his interference with the business.—North Side State Bank v. Manthey, Minn., 190 N. W. 72.

16.——Notes.—Where a bank applied proceeds of a crop deposited with it on tenant's note secured by mortgage, on which landlord was surety, knowing the tenant was insolvent, and the landlord was looking to the deposit for the repayment of an indebtedness, and was ready and willing to pay the note and thus obtain the benefit of the mortgage, it was liable for her loss of the security afforded by the mortgage.—Lingner v. Gaines, Tex., 244 S. W. 205.

17.——Preferred Claims.—Where a special deposit is placed in a bank to be used only in payment of certain shares of capital stock of the bank when the same should be duly authorized and issued, which stock was not authorized nor issued, but the bank misappropriated the money so deposited and used the same in its general business, thereby augmenting its assets, and where shortly afterwards the bank became insolvent and its assets passed into the hands of a receiver, the special deposit constitutes a trust fund which the

beneficial owner was entitled to follow and reclaim from the augmented assets in the hands of the receiver in preference to the claims of general creditors.—Secrest v. Ladd, Kan., 209 Pac. 824.

18.——Trust Funds.—The "earmark rule" that through the process of commingling money or deposit with the funds of a bank it loses its identity, with the resultant effect of defeating the right of preference over general crediors, has been relaxed, so that the trust fund is recoverable where an equal amount in cash remained continuously in the bank until its suspension and passed to the receiver.—Hitt Fireworks Co. v. Scandinavian American Bank, Wash., 209 Pac. 680.

19. **Bills and Notes**—Makers.—Where a note was signed in the name of a stated company by defendants' decedent and two others, and then decedent's signature occurred again, and these parties were described in the note as makers, decedent was liable as a joint maker.—Bertenshaw v. Lincoln State Bank, U. S. C. C. A., 283 Fed. 25.

20.——Surety.—One who indorsed note "For value received, I hereby guarantee the payment of the within note and any renewal of the same in force and effect as a joint maker primarily liable thereon, and hereby waive protest, demand and all notice of non-payment thereof" was liable on note, where not barred by limitations, under Code 1907, § 4835, though maker was not insolvent and though note could be collected from maker by due diligence, such indorser being jointly and severally liable on the note with the maker, under Section 2503.—Carothers v. Callahan, Ala., 93 So. 569.

21. **Brokers**—Principal.—Where a real estate broker, in an action for services in finding a customer ready, able and willing to trade, fails to offer any evidence that the wife of his customer ever agreed to the trade or authorized her husband to make it, or ratified it, he has failed to carry out his agreement, and a judgment of non-suit is not erroneous.—Pentino v. Gallo, Conn., 118 Atl. 594.

22. **Carriers of Goods**—Agency.—Chief clerk in charge of clerical work of railroad at its office at a dock was not authorized to bind railroad by making new contract for transportation of silk cargo, which because of its wet and fermented condition could not be forwarded under the original shipping contract; the words "clerk" or "chief clerk" being suggestive only of clerical functions, and not of discretionary power to make important contracts.—Davis v. American Silk Spinning Co., U. S. C. C. A., 282 Fed. 954.

23. **Chattel Mortgages**—Registration.—Rev. St. arts. 5654, 5655, as to registration of chattel mortgages, affect only the rights of purchasers and creditors and have no bearing on transactions as between the original parties.—Sparkman v. First State Bank, Tex., 244 S. W. 127.

24.——Sales.—A contract of sale of an entire business, including book accounts and all work in the process of completion, seller reserving title as security, and buyer agreeing to pay for all work and materials after a stated date and the full price in installments, regardless of possible reclamation of the property by the seller, held a chattel mortgage, and not a conditional sale, notwithstanding a provision that seller, on default in any payment, might declare the entire sum remaining unpaid due and repossess himself of the property sold.—In re Goorman, U. S. D. C., 283 Fed. 119.

25. **Constitutional Law**—Judgments.—Acts 1915, p. 610, authorizing the Supreme Court to fix the amount of the judgment where of the opinion that the verdict was excessive and affirm the judgment for such amount if plaintiff remits the excess, held not to deprive the defendant of either due process nor equal protection of the law, nor to in any wise contravene the Constitution of the state.—Alabama Power Co. v. Talmadge, Ala., 93 So. 548.

26.——Jurisdiction.—Section 2, Article 7, of the Constitution, vests this court with exclusive appellate jurisdiction in civil cases, both at law and in equity; it also vests this court with original jurisdiction in certain matters, and further provides: "And the Supreme Court may exercise such other and further jurisdiction as may be conferred upon it by law."

Chapter 25, Session Laws 1921, confers original jurisdiction upon this court in actions to enjoin the collection of illegal taxes for state purposes. Held, that in so vesting this court with original jurisdiction in said matters the Legislature did no more than confer such other and further jurisdiction as is authorized to be conferred by said Section 2, Article 7, of the Constitution, and is a valid exercise of legislative power.—El Reno Wholesale Grocery Co. v. Taylor,Okla., 209 Pac. 749.

27.——Public Utilities.—An order of the Corporation Commission requiring a gas company to extend its mains and service pipes to meet the reasonable needs of a community within the corporate limits of the city, in which the company is operating under a franchise, cannot be deemed arbitrary or unreasonable and contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States, where it appears that the company was accorded full hearing before the Commission; that it is the only one authorized to serve the community in question with gas, and that the rate of return upon the cost of the extension, though amounting initially to only about 4 per cent, will probably soon become ample because of the growth of said community; and where the record does not show that the extension will render the business of the company as a whole unprofitable, or cause an additional burden upon the gas consumers as a whole by making necessary an increase in the rates.—Oklahoma Gas & Electric Co. v. State, Okla., 209 Pac. 777.

28.——Special Privilege.—Laws 1921, p. 843, §§ 1-4, authorizing a private concern to compile and publish the official statutes, and making such statutes, evidence of the acts contained therein under Rev. St. 1874, c. 51, § 10, held to grant such concern a special privilege in violation of Const. art. 4, § 22.—Callaghan & Co. v. Smith, Ill., 136 N. E. 748.

29. **Conversion**—Election.—A provision in a will that those interested in an estate in remainder in real estate may sell the property did not convert the property into personality, and the parties had the right to elect to take it as real estate, and they must be treated as having done so where they proceeded to have it divided in a partition proceeding.—In re Eichelberger's Estate, Pa., 118 Atl. 554.

30. **Corporations**—Dealing With Officer.—Where an officer of a corporation is dealing therewith in his individual interest, the corporation is not chargeable with his uncommunicated knowledge of facts derogatory to his title to property constituting the subject-matter of the transaction.—Citizens' Bank v. Kriegshauser, Mo., 244 S. W. 107.

31.——Electors.—Under corporate by-laws providing that two inspectors of election should be chosen annually and Stock Corporation Law, § 31, using the plural in referring to the election of inspectors, it was necessary to the validity of an election of directors that there should be at least two inspectors.—In re Remington Typewriter Co., N. Y., 196 N. Y. S. 309.

32.——Notice.—Where plaintiff took over the assets and liabilities of another company, and was practically the same company, except that it was operating on an enlarged scale and with a foreign charter, it was bound by knowledge or notice on the part of its predecessor of a defect in the title to an oil lease so taken over.—Charles v. Roxana Petroleum Corporation, U. S. C. C. A., 282 Fed. 983.

33.——Proxy.—The ratification at a stockholders' meeting of a chattel mortgage made without the required consent of two-thirds of the stockholders, and authorized at a directors' meeting at which there was no quorum present, excluding directors who were also mortgagees, was a matter within the scope of the corporate business, as to which a proxy, authorized to act for stockholders as fully as if personally present, could represent them.—McClean v. Bradley, U. S. D. C., 282 Fed. 1011.

34.—Representations.—Where a stock salesman, who was agent and representative of a corporation, represented to plaintiff that a stock dividend of 100 per cent and a cash dividend of 20 per cent would be declared soon by the company and that as much as half of the stock which plaintiff would

buy would be sold at double the price he paid therefor, these misrepresentations cannot be said to have been immaterial as being "glittering promises" to do something in the future, but were material representations and promises which induced plaintiff to enter into the contract.—Mack Mfg. Co. v. Oeding, Tex., 244 S. W. 156.

35.——Service.—Personal service on a foreign corporation's assistant treasurer, while temporarily in the state in charge of an exhibit at a motor-boat show, was insufficient.—Brandow v. Murray & Tregurtha Corporation, N. Y., 196 N. Y. S. 293.

36. **Covenants**—Incumbrances.—An incumbrance upon land is a right or interest in some person other than the owner to the diminution of the owner's interest in the land. A private drainage contract was entered into between contiguous property owners. Under it a tile drain was constructed which is of great benefit to all the land involved. Neither the contract nor the drain constitute a breach of a covenant against incumbrances in a deed of a parcel of land so benefited. A right of other owners to enter for purpose of maintenance or repair of the improvement does not convert it into an incumbrance.—Carver v. Lane, Minn., 190 N. W. 68.

37. **Damages**—Advancements.—In an action for injuries, advancements made by defendant to plaintiff for payment of bills should not be considered on the question of damages.—Dickerson v. Connecticut Co., Conn., 118 Atl. 518.

38.——Penalties.—A clause in the contract under consideration, which has for its purpose to fix in advance the amount of the company's liability in damages in anticipation of a breach of such contract by failing to furnish the feature film at a specified time and place, is void under said Section 975, R. L. 1910.—Vitagraph-Lubin-Selig-Essanay v. Billings, Okla., 209 Pac. 773.

39.——Statute.—Where a company is engaged in the business of furnishing feature films to be exhibited in moving picture shows for hire and it contracts with B., who is engaged in conducting a moving picture show, to furnish a particular film to be exhibited in B.'s moving picture show on a specified date, but fails to deliver the film according to contract, said Section 2852, supra, defines the measure of damage.—Vitagraph-Lubin-Selig-Essanay v. Billings, Okla., 209 Pac. 773.

40. **Electricity**—Estoppel.—Where city, in reliance on contracts with power company to furnish it with electricity at specified rates, dismantled its own power plant, and the company recognized the validity of the contract by furnishing electricity thereunder for more than five years, and until after the enactment of a statute empowering the city to enter into such a contract, the company subsequently thereto was estopped from claiming that the contract was void because ultra vires at the time it was entered into.—Central Power Co. v. Central City Neb., U. S. C. C. A., 282 Fed. 998.

41.——Trespass.—Where defendant's deed to land was on record, a light and power company erecting poles thereon was bound by the record and was a trespasser when it did not have defendant's consent, though defendant's son, occupying part of the premises as tenant, consented.—Roxbury Light & Power Co., v. Dimmick, N. Y., 196 N. Y. S. 320.

42. **Frauds, Statute of**—Acceptance.—Where a debtor and creditor verbally agreed that the latter would accept an automobile in part payment, and then went to a garage where the automobile had been left for repairs and informed the manager of the garage thereof, and that repairs thereafter should be charged to the creditor, the transaction was executed and was not a sale, so that Sales Act, § 4 (P. L. 543; Pa. St. 1920, § 19652), did not apply.—Selznick v. Holmes Pittsburgh Automobile Co., Pa., 118 Atl. 553.

43. **Fraudulent Conveyances** — Corporations.—An agreement by a stockholder employee of corporation to cancel claims against the corporation for compensation, as an inducement to his brother to buy stock in the corporation, was valid as against such stockholder's creditors unless collusion in fraud of them was shown.—Maxcy v. Peavey, Wis., 190 N. W. 84.

44. **Husband and Wife**—Evidence.—In wife's action against husband's parents for alienation of affections, testimony as to will of the mother, who died pending the action, being withheld from probate by defendant's counsel without explanation of the long witholding of the will from probate by the defendant, held admissible as a suspicious circumstance against defendant.—McAllister v. McAllister, Colo., 209 Pac. 788.

45. **Innkeepers** — Proximate Cause.—In action against hotel keeper for injuries to guest struck by screen after other guest had accidentally knocked screen out of window down through skylight in which the jury could have believed from the evidence that the screen would not have fallen but for the fact that it was insecurely or unsafely fastened, the question of whether the negligence of the hotel keeper in permitting screen to remain unsafely fastened was the proximate cause was a question for the jury.—Dye-Washburn Hotel Co. v. Aldridge, Ala., 93 So. 512.

46. **Insurance**—Covenants.—Where an indemnity policy for accidental death provided for a reduction of indemnity, if insured should carry with another company other insurance covering the "same loss" without giving the indemnity company notice, another policy for indemnity for "death from whatever cause", although including accidental death, does not cover the "same loss", since death benefit is not a dominating feature of the accident policy.—Arneberg v. Continental Casualty Co., Wis., 190 N. W. 97.

47.——Employees.—Where an indemnity policy covered injuries to employees engaged in the erection of any building and then described a certain building and also provided that no wrecking was to be done, insurer was not liable for loss resulting from an injury occurring in the wrecking of a portion of another building.—Byrd & Bryan v. Georgia Casualty Co., N. C., 114 S. E. 1.

48.——Insurer's Agent.—Where insurer's agent fills out an application, knowing or having been informed by applicant of facts demanded by questions therein, mistakes in the application concerning such facts, including improper classification of insured's occupation, do not avoid the policy.—Arneberg v. Continental Casualty Co., Wis., 190 N. W. 97.

49.——Payments.—Where British marine policies were payable at $4.75 to the pound to an American mortgagee, the London insurance broker, who had, at the instance of his American correspondents, placed the policies, had no authority to accept payment of loss thereunder in pounds, then worth only $3.37.—McLanahan v. Marine Ins. Co., U. S. D. C., 283 Fed. 240.

50.——Waiver.—A life insurance company waived its right to claim that policy was invalid, because not delivered during good health, where, with notice from disability claim that disability commenced before delivery of the policy, it demanded payment of the second premium, and later received it and waited for some time before electing to rescind.—New York Life Ins. Co. v. Dumler, U. S. C. C. A., 282 Fed. 969.

51.——Waiver.—This case is controlled by the rulings made in Williams v. Atlas Assurance Co., 22 Ga. App. 661, 97 S. E. 91, and cases there cited. Under the express terms of the policy requiring sworn written proof of loss to the insurer, the conduct of the local agent, who issued the policy, in assuming to decline payment for the loss, would not constitute a waiver of such proof; nor, in view of other express stipulations of the policy, would such writing be waived on account of the act of the company's adjuster in taking charge of what remained of the burned automobile for the benefit of all concerned.—Northern Assur. Co. v. Pate, Ga., 114 S. E. 69.

52. **Intoxicating Liquors**—Indictment.—An indictment under National Prohibition Act, tit. 2, § 33, for possessing liquor for beverage purposes, is insufficient, unless it negatives the proviso by alleging that the liquor was not possessed by defendant in his private dwelling occupied by him for his personal use and consumption.—United States v. Boasberg, U. S. D. C., 283 Fed. 305.

53.——U. S. Ships.—A vessel which had been transferred by the United States to the United States Shipping Board, under Act June 5, 1920, § 4, was not subject to forfeiture for transportation of intoxicating liquor within the United States, under National Prohibition Act, tit. 2, § 26, in view of Act March 9, 1920, § 1, prohibiting seizure under judicial process of a vessel owned by the United States, and Section 13, expressly repealing inconsistent provisions of other acts, since the transfer of the vessel to the Shipping Board did not divest the title out of the United States.—The Coldwater, U. S. D. C., 283 Fed. 146.

54.——Warrant.—Where a bottle and demijohn containing intoxicating liquor unlawfully in defendant's possession were in plain sight when officers entered a kitchen in the rear of his soft drink barroom, the seizure thereof was legal, whether or not they had a valid search warrant.—Vachina v. United States, U. S. C. C. A., 283 Fed. 35.

55. **Landlord and Tenant**—Rent.—Failure to pay rent does not in itself terminate a lease, but lessor must make common-law demand for actual rent due, and thereafter, under G. L. 2130, the tenant may tender rent in court and not suffer forfeiture, which right is retained notwithstanding stipulation in lease to pay rent or deliver possession.—Capital Garage Co. v. Powell, Vt., 118 Atl. 524.

56. **Master and Servant**—Negligence.—Where it was necessary to keep torpedoes in the locomotive cab the railroad company, though required to exercise a high degree of care, was not negligent in keeping them under the fireman's seat.—Goupiel v. Grand Trunk Ry. Co., Vt., 118 Atl. 586.

57. **Mines and Minerals**—Exemptions.—Grantors cannot legally reserve rights they do not own, and where only surface rights are owned, the conveyance should not reserve unto grantors underlying coal rights, but may properly be in words "excepting the coal underlying said premises."—McCall v. Middleton, Ill., 136 N. E. 723.

58.——Measure of Damages.—The measure of damages for failure to sink oil well to contracted depth is the sum necessary to sink to that depth from depth where contractor stopped.—Covington Oil Co. v. Jones, Tex., 244 S. W. 287.

59. **Municipal Corporation**—Duty of Driver.—That defendant's truck was at the intersection first did not give it the right to proceed without reasonable care as to the rights of pedestrians crossing the intersection, and there was also the other duty upon the driver of observing other traffic.—Foley v. Taylor, Wash., 209 Pac. 698.

60.——Liability.—A city, in supplying water to private consumers upon contract and for compensation, acts in a proprietary capacity, and is liable for negligence in the operation of the waterworks system.—Highway Trailer Co. v. Janesville Electric Co., Wis., 190 N. W. 110.

61.——Measure of Damages.—In action for damage to property caused by a change in the grade of a street, the correct measure of damages is the difference betwen the market value of the property immediately before and immediately after such change of grade, and not what it would cost to restore the property to its original condition, unless such cost is less than the depreciation and the market value.—Gehlert v. City of Union, Mo., 244 S. W. 97.

62.——Proximate Cause.—Where a gentle and reliable team, hitched to a wagon, on a public street, takes sudden fright, and, before its driver can make proper effort to regain control thereof, swiftly runs into a defect in the street about 30 feet away, an injury received thereby by a passenger in the wagon is actionable, and the defect in the street is the proximate cause of the injury.—Weaver v. Wheeling Traction Co., W. Va., 114 S. E. 131.

63. **Negligence** — Instructions.—An instruction that no recovery could be had for injuries unless plaintiff proved by the greater weight of the evidence that the injuries were sustained "without any negligence or carelessness on the part of the plaintiff" is reversible error.—Garesche v. Maier, Mo., 244 S. W. 92.

64. **Principal and Agent**—Sales.—Where the order for a motor truck, signed by the purchaser, recited that it was subject to approval by the home office of seller, that title should remain in the seller until full payment of price, and that the entire balance of the purchase money was to be paid on delivery of the truck, a salesman securing such order had no authority to sell the truck to the buyer on credit and take from him a chattel mortgage in his own name.—National Discount Co. v. Hooper, Md., 118 Atl. 605.

65. **Sales**—Contract.—Under contract between automobile manufacturer and a dealer, providing that dealer should receive discount of 20 per cent on the fourth to the ninth cars ordered by him and greater discounts on subsequent cars, and that the manufacturer should bill cars at the regular initial discount of 20 per cent, and, when dealer's purchases should entitle him to a higher discount, bill them at such higher discount, and apply on cars previously purchased the difference between it and the total discount earned prior thereto, the dealer was entitled to no discount on the first car, and where it was billed at a discount of 20 per cent, the transaction was either a separate one outside of the contract, a valid modification of the existing contract, or a completed gift, and in either case a closed transaction, so that the discount voluntarily allowed could not be recovered, no more cars having been ordered.—Alfred J. Higgins Auto Co. v. Stanley M. C. Co., N. Y., 196 N. Y. S. 302.

66. **Searches and Seizures**—Legal by Sheriff.—In liquor prosecution, evidence obtained by a sheriff by means of an illegal search warrant, held competent, notwithstanding Const. Amend. 4, prohibiting unreasonable searches and seizures, since such amendment does not protect a citizen from unreasonable search, except where made or participated in by federal officers or under federal process.—Kirkley v. United States, U. S. C. C. A., 283 Fed. 34.

67. **Taxation**—Exemptions.—Shipyard property of the United States Shipping Board Emergency Fleet Corporation, purchased by the corporation pursuant to and with funds appropriated by Act Nov. 4, 1918, § 1 (Comp. St. Ann. Supp. 1919, § 3115 1-16ddd), are exempt from taxation by the state, in view of Act June 5, 1920, § 4, even though the legal title was in the corporation, a private corporation since the government caused the corporation to be formed, held all of its stock, furnished all of its capital, and owned the entire beneficial interest in its property.—King County, Wash., v. United States Ship. Board E. F. Corp., U. S. C. C. A., 282 Fed. 950.

68.——Exemptions.—In view of Laws 1895, c. 66, exempting property of educational institutions, and Laws, 1913, c. 115, §§ 1, 2, amended by Laws 1915, c. 150, which substitutes occupancy for exclusive use as a test of exemption, property of an educational institution, in actual possession of others, occupied by tenants who are not students or officers of the corporation, should be taxed, and all other land occupied by the corporation for its purposes is exempt.—St. Mary's School v. City of Concord, N. H., 118 Atl. 608.

69. **Telegraphs and Telephones**—Rates.—Under Public Utilities Act, § 36, an order of the Commerce Commision, permanently suspending a schedule of rates proposed and filed by a telephone company, on the ground that by reason of a decline in the price of labor and materials the Commission could not fix rates for the future, and, refusing to determine what would be reasonable rates, is void; it being the duty of the Commission to determine whether or not the proposed schedule of rates is reasonable, and, if not, to determine what are reasonable rates.—Illinois Bell Telephone Co. v. Commerce Commission, Ill., 135 N. E. 676.

70. **Waters and Water Courses**—Private Enterprise.—A company whose business is confined to selling water under contract to other companies or municipalities, which in turn distribute and sell to the public, is not a public utility "whose ownership, management, operation and control are for public use" within the meaning of Act April 21, 1911 (P. L. p. 376), § 15, defining a public utility.—Acquackanonk Water Co. v. Board of Public Utility Com'rs, N. J., 118 Atl. 535.